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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TROY PHILLIP VAN OTTEN,

Defendant and Appellant.

D076725

(Super. Ct. No. SCD237822)

APPEAL from a judgment of the Superior Court of San Diego County, Desiree A. Bruce-Lyle, Judge. Affirmed.

Lizabeth Weis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

This is an appeal from a postjudgment order denying appellant's request for resentencing under Penal Code¹ section 1170, subdivision (d)(1) after the Department of Corrections and Rehabilitation (CDCR) recommended that appellant be resentenced in light of his efforts while in prison to rehabilitate himself. We will find the trial court acted well within its discretion in declining to recall the sentence.

PROCEDURAL BACKGROUND

In February 2013, Troy Phillip Van Otten pleaded guilty, without an agreement with the prosecutor, to robbery (§ 211; count 1); assault with a firearm (§ 245, subd. (a)(2); count 2); possession of a firearm by a felon (§ 12021, subd. (a)(1); count 3); and possession of drug paraphernalia (Health and Saf. Code, § 11364; count 4). He admitted he personally discharged a firearm in count 1 (§ 12022.53, subd. (c)). In addition, Van Otten admitted a strike prior (§ 667, subds. (b)-(i)); a serious felony prior (§ 667, subd. (a)(1)); and a prison prior (§ 667.5, subd. (b)).

At sentencing, the court struck the strike prior and the prison prior. The court imposed a determinate sentence of 27 years in prison.²

In October 2019, the court held a hearing on the CDCR recommendation that the court recall the sentence under section 1170, subdivision (d)(1) and resentence Van Otten to a lower term. The trial court denied the request and maintained the original sentence.

¹ All further statutory references are to the Penal Code unless otherwise specified.

² The facts of the underlying offense are not relevant to the issues presented by this appeal. We will omit the traditional statement of facts.

Van Otten appeals, contending the court abused its discretion in denying the request to recall the sentence.

DISCUSSION

After the trial court reviewed written submissions and heard argument, the judge made the following statement of her reasons for denying the request to recall the sentence.

"All right. So after reviewing all of the exhibits presented to the Court, recognizing that the Court does have discretion in this instance in whether or not to grant a resentencing, this Court still has, after reviewing everything, concerns about Mr. Van Otten's ability out of a structured setting to abide by the norms of society. And that is all reflected in all his previous offenses, his release into the community, and what's happened without the structure.

"He is doing very well, indeed, in custody right now because of all the structure that he has. And the Court is not convinced that circumstances have changed sufficiently for him to be entitled to a resentencing in this matter.

"For those reasons and in the exercise of the Court's discretion and not finding it in the interest of justice to sentence Mr. Van Otten, the request for resentencing is denied."

Van Otten contends the court's decision was an abuse of discretion. We disagree and will affirm.

A. Legal Principles

Section 1170, subdivision (d)(1) allows a trial court to recall a sentence under certain circumstances. Where there is a recommendation by CDCR to recall and reduce a prisoner's sentence, the court may consider, among other things, the person's post sentence behavior in prison to determine whether to grant or deny a request to recall the

sentence. The court's decision in evaluating a request to recall is necessarily an exercise of discretion. (*Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1833.) We review the court's decision under the abuse of discretion standard of review. (*People v. Pritchett* (1993) 20 Cal.App.4th 190, 195.) The party challenging the decision bears the burden to demonstrate an abuse of the court's discretionary authority. The party must not only show that there was a reasonable alternative to the court's decision, but must also show the decision was arbitrary, unreasonable or that it was a miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

B. Analysis

The trial judge here was the original sentencing judge. The court originally allowed Van Otten to plead guilty without agreement from the People so the court could resolve the case and grant the defendant some leniency. At the time of the request to recall the sentence, the court was aware of the offense, Van Otten's criminal history, and his performance while in prison. As the court and CDCR noted, Van Otten has made good progress while in prison, thus the recommendation by CDCR.

Van Otten emphasizes the significant review that was done by CDCR and to some extent uses the agency's recommendation as an implied argument it would be unreasonable to reject such a thorough analysis. Of course, the statutory scheme places the decision-making responsibility with the trial court, not prison authorities. While the agency recommendation is entitled to considerable weight, it remains the trial court's responsibility to decide whether to grant or deny the request.

Van Otten relies on *People v. Torres* (2020) 48 Cal.App.5th 550, 560, for the proposition that a trial court cannot ignore established guidelines nor may it consider improper material. First, *Torres* was considering section 1170, subdivision (e) dealing with compassionate releases under statutorily established guidelines. That section is substantially different than section 1170, subdivision (d)(1) dealing with recall of sentences. In any event, it is not necessary to discuss *Torres* in the context of this case and the applicable statute. Simply put, there is nothing in the record to show the trial court ignored mandatory considerations or that it considered improper material. Disagreeing with CDCR and the defense does not constitute disregarding material or considering improper material. Here, the court weighed all the material before it and reached a reasoned decision. That the defense disagrees with the court's weighing process does not amount to an abuse of discretion.

The record is clear that the trial judge had before her all of Van Otten's background material, knowledge of the offense, the CDCR recommendation, and supporting materials separately submitted to the court. It is obvious the decision was made with awareness of the court's discretionary authority and the reasons for and against recall of the sentence. Undoubtedly, reasonable minds could differ on whether to grant or deny this request, which of course only illustrates it is a discretionary judgment not simply an evaluation of legislative established criteria.

We cannot say the court's decision was unreasonable, arbitrary, or a miscarriage of justice. (*People v. Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125.) Accordingly, we will affirm.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

IRION, J.